

# Preface

Under Article 38 of its Statute, the International Court of Justice can apply judicial decisions only as a “subsidiary means for the determination of rules of law”. However, there are many reasons to believe that international courts and tribunals do play quite an important role in the progressive development of international law. There are a number of decisions which are inevitably recalled as the first step, or a decisive step, in the process of the formation of a new rule of customary international law. Can, in these cases, the judge be considered as a subsidiary of others? Are these cases compatible with the common belief that a judge cannot create law? Is this a peculiarity of international law, which is characterized by the existence of several courts but the lack of a legislator? Do decisions by different courts lead to the consequence of a fragmented international law? This volume aims to provide the reader with an elaboration of various questions linked to the legislative or, depending on the preferences, quasi-legislative role of courts.

In their choices of subjects, the contributors have taken into account both the general aspects of the development of international rules through court decisions and the instances of specific sectors of international law, such as human rights, international crimes, international economic law, environmental law, and the law of the sea. Others have chosen the subject of rules on jurisdiction and the procedure of international courts. The question of the courts’ role, *mutatis mutandis*, in the development of areas of law different from public international law, namely private international law and European Union law, has also been considered.

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The subject of this collection of essays is also linked to the outstanding characteristics of the scholar in honour of whom it is published at the time of his retirement from the University of Milan. Tullio Treves combines an academic background with the experiences of a negotiator of international treaties and a judge of an international tribunal.<sup>1</sup> He has been professor of international law

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<sup>1</sup> For more details see the *curriculum vitae* included in this volume.

in the Italian Universities of Sassari, Turin, and Milan and has given and will deliver lectures and courses in many and prestigious academies all around the world, including the Hague Academy of International Law. His bibliography is impressive for the quality and number of works, as well as for the variety of the subjects and languages.<sup>2</sup> His first diplomatic experience, as a legal expert of the Italian delegation at the Third Conference of codification of international law of the sea (1973–1982), has been followed by several others. In 1996 he was elected judge of the International Tribunal for the Law of Sea where he sat until 2011. He was subsequently also elected by his colleagues as President of the Seabed Disputes Chamber of the Tribunal and largely contributed to the seminal advisory opinion rendered by it in 2011 on *Responsibilities and Obligations of States Sponsoring Persons and Entities with respect to Activities in the Area*.

It is also because he has a great deal to say on how international law develops that the editors of this collection are certain that Tullio Treves will appreciate the contributions written by friends and colleagues and collected in this volume.

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The two original editors Nerina Boschiero and Tullio Scovazzi, owe a great debt of gratitude to Tullio Treves under the supervision of whom they have begun their legal studies and with whom they have subsequently shared many unforgettable experiences. They have taken the initiative of promoting this collection of essays also as the less young<sup>3</sup> among those who have the privilege to consider Tullio Treves as their mentor.

In their task, while having the benefit of reading in advance the contributions and learning a great deal from them, the editors had to address two inevitable questions

The first question was the drawing of the list of contributors. It was evident that it would have been impossible to include all those who were willing to participate for well justified reasons of friendship and collaboration and that a difficult and perhaps questionable choice had to be made. The editors finally decided to invite a number of lawyers who have participated with Tullio Treves in diplomatic negotiations or have been judges at the International Tribunal for the Law of the Sea. They have also included his colleagues at the Department of International Law of the University of Milan and on the board of editors of the *Rivista di Diritto Internazionale Privato e Processuale*. Finally, they have invited some young scholars who have benefited from academic advice and supervision by Tullio Treves during the development of their legal research.

The second question was the dimension of the contributions in order not to exceed what could be contained in one volume. The editors started by prescribing a precise limit of space and continued by strictly enforcing it. Most contributors

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<sup>2</sup> See the bibliography included in this volume.

<sup>3</sup> To be precise, Tullio Scovazzi is much older than Nerina Boschiero.

have complied with this imposition and the editors are sincerely grateful to them because they have facilitated their task. Other contributors have not<sup>4</sup> and the editors are equally grateful to them, because they have understood the deeply rooted Mediterranean culture of the editors, according to which every rule has its exceptions.

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The editors wish to thank all those people who in one way or another have helped to bring this collection of essays to its conclusion. In particular the editors are indebted to Chiara Ragni and Cesare Pitea, who with a lot of competence and goodwill took much of the burden of the editorial effort on their shoulders and were finally appointed editors, together with the two original ones. They are also grateful to Angelica Bonfanti, Benedetta Cappiello, Chiara Sisler, Elena Fasoli, Francesca Romanin Jacur, Giorgia Sosio De Rosa, Giulia Bigi, Luigi Crema, Maria Chiara Noto, Michele Potest, Sabrina Urbinati, Seline Trevisanut, and Stefano Brugnattelli who acted as ‘stylists’ in ensuring that each paper was written in a uniform style as for abbreviations, quotations, and other details. Special thanks are due to Peter Morris who supervised most of the papers written by non-English native language contributors, to Seline Trevisanut, who did a similar work for texts in French, as well as to Philip van Tongeren and Marjolijn Bastiaans who provided the highly professional publishing services of T.M.C. Asser Press. It is also appropriate to thank the Universities of Brescia, Cagliari, Milan, Milano-Bicocca, Parma, and Trento which financed the publication of this book. Above all the editors wish to express their gratitude to the group of friends, colleagues and followers of Tullio Treves who generously contributed their intellectual resources and valuable time to make possible the completion of this collective effort.

Milan, June 2012

Nerina Boschiero  
Tullio Scovazzi

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<sup>4</sup> Regrettably one of the editors is among them.



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